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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 419

UNITED STATES OF AMERICA,

Respondent,

—*against*—

ANGELO PACCIONE,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

ANGELO PACCIONE, petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, dated and entered on the 27th day of July, 1955, affirming the judgment of conviction entered in the United States District Court for the Southern District of New York, on a jury verdict of guilty of violation of Title 21, Sections 173-174, United States Code, and in violation of Title 18, Section 371, United States Code.

OPINIONS BELOW.

The decision and opinion of the United States Court of Appeals has not yet been reported.

JURISDICTIONAL STATEMENT.

No formal opinion was rendered by the District Court. The judgment of the United States Court of Appeals was dated and entered on July 27, 1955. Associate Justice Clark of this Court granted an application to extend the time of the petitioner to make this application until September 24, 1955.

THE QUESTIONS PRESENTED FOR REVIEW.

1. The petitioner was found guilty of a sale of one-fourth ounce of heroin on May 6, 1953, possession of ten ounces of heroin on May 8, 1953, in violation of the Federal Narcotic Laws (Title 21, Sections 173-174, United States Code) and the crime of conspiracy to violate the Federal Narcotic Laws, in violation of Title 18, Section 371, United States Code, and was sentenced to a term of five years on each count, to run consecutively, making a total sentence of fifteen years. This sentence was wholly excessive and in view of the fact that it was petitioner's first offense for the violation of any of the laws of the United States and the first offense in connection with narcotics, the sentence was wholly at variance with established punishment for such crimes. (The only prior conviction was that for Grand Larceny in the New York State Court, in the year 1936, when he was sentenced to a term of three to ten years, at a time when he was twenty-one years of age.)

2. The petitioner was compelled to proceed to trial with counsel not of his own choice, after he had lost confidence in said lawyer, and desired an adjournment for the purpose of having his new lawyer, whom he had already retained, try his case.

3. The trial court refused to grant the petitioner a writ of habeas corpus *ad testificandum* to produce from the Federal Penitentiary at Milan, Michigan, the two co-defendants

who were named in the same indictment with the petitioner, who were important and necessary witnesses who would have exculpated the petitioner herein, and as a result, petitioner was deprived of their testimony and compelled to proceed to trial without the testimony of said witnesses.

STATEMENT OF THE CASE.

Petitioner Paccione was charged with Counts I, IV and V of a five count indictment filed May 29, 1953. Counts IV and V charged respectively a sale of one-fourth ounce of heroin on May 6, 1953 and possession of ten ounces of heroin on May 8, 1953, in violation of the Federal Narcotic Laws (Title 21, Sections 173-174, United States Code). Count I charged a conspiracy to violate the Federal Narcotic Laws in violation of Title 18, Section 371, United States Code.

The two co-defendants, Anthony Musarra and Nicholas Constantino were charged with similar offenses in the same indictment.[1]

On October 15, 1954, Musarra and Constantino, who had entered pleas of guilty to the indictment on February 8, 1954, were sentenced to *four years each.*

Trial as to petitioner Paccione began on Friday, December 10, 1954, and the case was adjourned until Tuesday, December 14th, due to the fact that the court was completing another case, which was then in progress. On December 14, 1954, the case was further adjourned to December 16, 1954. On December 16, 1954, the court was apprised that petitioner's lawyer, Mr. Vecchiarelli, was ill. The case was again adjourned until December 17, 1954, and then again until December 20, 1954.

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[1] Musarra and Constantino were joined with Paccione as co-defendants in the conspiracy charge under Count I. Both were named as defendants in Counts II and III charging sales of one-fourth ounce of heroin on March 6 and March 10, 1953; and Musarra was joined with Paccione in Count IV charging a sale of heroin on May 6, 1953.

On the morning of December 20, 1954, petitioner's lawyer requested a writ to bring the two co-defendants named in the indictment from Milan, Michigan, to testify. This application was opposed by the Assistant United States Attorney, although he admitted that he had misinformed the said attorney that the said witnesses were at that time in Milan, Michigan. Because of this information, the attorney proceeded to Milan, Michigan, and found that the said witnesses were not in Michigan (R. 9).[2]

The court was informed by the Assistant United States Attorney that counsel for petitioner had been lax in procuring the attendance of said witnesses at the trial.

Thereupon, the court denied the request for an adjournment of the trial for the purpose of bringing in said witnesses.

This was done by the court, although it knew that the attorney for petitioner had been ill for the prior ten days.

Upon hearing this, petitioner became apprehensive and informed his then attorney that he did not desire him to represent petitioner, and that he desired an adjournment for the purpose of obtaining new counsel (R. 10, 11, 12), but the court denied this request and refused any further adjournment, and the petitioner was compelled to proceed to trial. The case was tried on December 20th, December 21st and December 22nd, and resulted in petitioner's being convicted on all counts in which he was named in said indictment, and was immediately sentenced to a term of fifteen years, as above set forth.

APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS.

1. Constitution of the United States, Fifth Amendment:

   "* * * nor be deprived of life, liberty or property without due process of law."

2. Statutes. Title 21, Section 174, United States Code:

   "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or

[2] (R.) refers to filed record.

any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years."

3. Title 18, Section 371, United States Code:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

As has heretofore been set forth, Federal jurisdiction in the trial court stems from Title 21, Sections 173-174, United States Code, and from Title 18, Section 371, United States Code.

REASONS FOR THE ALLOWANCE OF THE WRIT.

Due process in criminal cases requires not only that the accused be entitled to representation by counsel, but that the defendant shall have complete confidence in said counsel and that the assistance furnished shall be effective. Petitioner's assigned counsel herein apparently worked vigorously, but as the results proved, ineffectively. He apparently had been under the misunderstanding that he would have no difficulty in securing the presence of the two witnesses that the petitioner desired to testify in his behalf at the trial, and the petitioner apparently relied upon this commitment;

that when petitioner learned that he would not have these witnesses available for him, he lost confidence in his lawyer, and thereupon arranged to secure a lawyer, one Thomas F. Burchill (R. 12, 13, 14). The court refused a one-day adjournment, despite the fact that through circumstances beyond the control of any of the parties, the case had been extended for more than ten days. Surely, in a case resulting in the petitioner's receiving so severe a sentence, he was entitled to every protection afforded to him by the Constitution.

Due to the fact that a conspiracy was charged in Count I of the indictment, together with the two witnesses whom the petitioner sought to produce at the trial, the government's principal witness (an agent) was permitted to testify to statements made by the co-defendants, not in the presence of the petitioner, wherein the co-defendants informed the said agent that petitioner was the person who would deliver the narcotics to him and that he, petitioner, was working with said co-defendants. This hearsay testimony was evidently permitted by reason of the fact that they were allegedly statements made by co-conspirators in furtherance of the said conspiracy. The testimony of the said witnesses, Musarra and Constantino, therefore, became of paramount importance to the petitioner, as they could have put in issue before the jury the fact as to whether or not such conversations ever did take place. The affidavit of the trial attorney for the petitioner, which begins at page 14 of the appendix to the appellant's brief in the United States Court of Appeals, clearly shows that the trial attorney had interviewed the said two witnesses on December 6, 1954, just four days before the impanelling of the jury for the trial of this case, and that in his opinion they were necessary and indispensable witnesses.

The production of these witnesses before the Court would have at most, required an extension of the trial for a matter of twenty-four or forty-eight hours, and the failure of the Court to grant such a short adjournment, in effect, violated

the Fifth Amendment of the United States Constitution, and deprived the petitioner of his liberty without due process of law.

There is no question that the observance of the constitutional safeguards surrounding a fair trial is such a basic jurisdictional requirement, that when absent, a conviction must be set aside. *Johnson* v. *Zerbst,* 304 U. S. 458.

THE SENTENCE GIVEN TO PETITIONER WAS EXCESSIVE.

Immediately after the jury rendered its verdict, the trial court sentenced petitioner. He gave petitioner the maximum sentences permitted, namely five years on each count, to run consecutively, plus the maximum fine of $2,000, which later was remitted. The Judge's remarks (R. 236, 237, 238) clearly showed that the Trial Judge was prejudiced against this petitioner though there was a complete absence of testimony which justified the display of judicial hostility underlying the sentencing itself. The record was short and no untoward circumstances intervened. There was no danger or hardship attendant upon anything relating to the circumstances of the treasury agent's processing of this case, and this, in addition to the fact that the convicted petitioner stood before the Seat of Justice carrying a bullet in his body, adjacent to his spine, inflicted upon him by the principal witness for the government, the effects of which could never be foretold, except possibly one thing—namely, he might not, because of such bullet, outlive his sentence.

Thus, no consideration or calculation was made for this additional punishment. Thus physical pain and injury were in addition to the maximum period of incarceration the law permitted the Judge to impose.

Illustrating the violent feeling engendered by the conviction, were remarks by the court, as follows:

> "The Court: Now, Mr. Paccione, I don't expect to see a case for a long time in which there is so little

> that can be said in behalf of the defendant at time of sentence. I am going to give you an extremely heavy sentence. I am going to give you the maximum which I can impose of five years on each count, to run consecutively."

Some justification could be found for such remarks if the sentencing Judge had before him a probation report where an investigation had been made and the report justified such a finding by the sentencing Judge. The record is barren here of any such justification.

The petitioner herein was sentenced not only to the maximum sentence on the substantive count, but also was sentenced to five years on the conspiracy count.

The disparity between the sentences meted out to the co-defendants and the petitioner is glaring.

The conspiracy charge in the indictment was formed for the express purpose of carrying out the substantive counts, and should, of necessity, merge with the substantive counts for the purpose of imposing punishment. The entire theory of the government was that the conspiracy was formed for such purpose. The Court of Appeals for the Second Circuit, on several occasions has expressed disapproval of such cumulation. *United States* v. *Chiarella,* 2 Cir., 184 F. 2d 903; *United States* v. *Pagano,* not officially reported, decided July 5, 1955, 2 Cir.

The learned Circuit Court, in approving the sentence in this case, said:

> "But in this instance there was, perhaps, more than the usual justification for requiring separate service of the sentences."

Petitioner has failed to find from this record the basis for such a finding.

REASONS FOR GRANTING THE WRIT.

The Court of Appeals has decided the Federal questions here involved as shown in conflict with the applicable decisions of this Court, and in violation of the Fifth Amendment of the United States Constitution.

CONCLUSION.

FOR ALL OF THESE REASONS PETITIONER RESPECTFULLY PRAYS THAT THIS COURT ISSUE A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT TO REVIEW ITS JUDGMENT AFFIRMING THE JUDGMENT OF CONVICTION OF PETITIONER.

Dated: New York, N. Y., September 19, 1955.

Respectfully submitted,

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APPENDIX "A".

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

No. 341 October Term, 1954.

Argued June 9, 1955. Decided July 27, 1955.

Docket No. 23631.

UNITED STATES OF AMERICA,

Appellee,

—*vs.*—

ANGELO PACCIONE,

Defendant-Appellant.

Before: CHASE, MEDINA, *Circuit Judges*, and RYAN, *District Judge*.

Appeal from a judgment of the District Court for the Southern District of New York. Walsh, *Judge*. Affirmed.

The appellant was tried by jury on an indictment one count of which charged the sale of one-fourth ounce of heroin and another the possession of ten ounces of heroin in violation of the federal laws relating to narcotics (Sections 173-174 of Title 21, U. S. C.). Another count charged a conspiracy to violate the federal narcotic statutes. He was found guilty on each count and was sentenced on each. This appeal is from that sentence.

J. EDWARD LUMBARD, United States Attorney for the Southern District of New York, Attorney for Appellee.

ROBERT M. PENNOYER, Assistant United States Attorney, of Counsel.

WALTER J. DI DONATO and JOHN H. MARIANO, Attorneys for Appellant.

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Per Curiam:

The appellant relied for reversal upon the insufficiency of the evidence to show the conspiracy as alleged and resulting error in allowing a narcotic agent to testify to statements made to him by alleged co-conspirators. Also upon the refusal of the court to continue the trial to allow him to obtain substitute trial counsel and to procure the attendance as witnesses for the defense of two alleged co-conspirators who were in jail in Michigan; upon error in the charge and upon the excessiveness of the sentences. We find no merit in any of these contentions.

There was ample evidence to show that the appellant and the two co-conspirators acted in concert in furtherance of an understanding they had with each other to violate the federal narcotic laws and as the statements of the co-conspirators which the agent testified were made to him were in connection with the sale of heroin delivered by the appellant to the agent they were in furtherance of the conspiracy and clearly admissible. United States v. Dennis, 2 Cir., 183 F. 2d 201.

The effort to secure time for the substitution of trial counsel was not made until ten days after the jury had been drawn and only when, after repeated delays, the trial was about to begin. The trial attorney who had represented the appellant for about a year and a half was present in court ready and able to conduct the defense and no fair reason was shown for causing further delay in starting the trial which such a belated attempt to have other counsel present would entail. Without adequate cause shown for such a request, the denial of it was without error. United States v. Mitchell, 2 Cir., 138 F. 2d 831, cert. denied 321 U. S. 794.

Nor was it an abuse of discretion to deny the appellant's application, made the morning the trial began, for the production in court at the expense of the government of the co-conspirators who were in jail. Weeks v. United States, 9 Cir., 179 F. 2d 319. Before the jury was drawn appellant's attorney had been asked by the government's attorney

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"whether he would want the witnesses brought back so that we could then set a trial date with time for him to bring them back." Yet he had not made known any such desire before, or when, the jury was drawn. Nor was any application made to have them subpoenaed pursuant to Rule 17(b), F. R. C. P.

The judge charged generally, as well he might, that the jury should take into account the interest, if any, which a witness had in the outcome of the trial in evaluating the testimony of such witness and that the appellant, who testified in his own defense, was an interested witness. Reagan v. United States, 157 U. S. 301. At the close of the charge the appellant requested the court to charge that the narcotics agent who testified for the government "is an interested party in the same sense that the defendant is in a similar degree." Regardless of any lack of timeliness in making this request, it was such an obvious exaggeration of the interest of the agent that there was no error in refusing to give it.

The sentences were, indeed, severe and the more so because, though the fines imposed have been remitted, the terms of imprisonment on the substantive counts and that on the conspiracy counts must be served consecutively.

Making conspiracy count sentences run consecutively with those on substantive counts is not unlawful where, as here, the substantive crimes were of such a nature that concerted action was not necessary for their commission. Pereira v. United States, 347 U. S. 1. We have at times expressed our disapproval of such cumulation, United States v. Chiarella, 2 Cir., 184 F. 2d 903, and recently in United States v. Pagano, — F. 2d. —, decided July 5, 1955, but in this instance there was, perhaps, more than the usual justification for requiring separate service of the sentences.

Judgment affirmed.

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